Supreme Court, U.S.
FILED

961363 FEB 24 1997

No. 96- OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

DOUG E. JONES, an Oklahoma Citizen,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the presumption of the Petitioner's identity for purposes of Oklahoma's enhanced punishment statute based only upon a showing of similar names on certified copies of judgment and sentencing forms violated the Due Process Clause by removing the prosecutor's burden of proof as to an essential element of proof.

2. Whether the presumption of identity for purposes of Oklahoma's enhanced punishment statute violates the Sixth Amendment's assurance of the right to confront the accuser by only requiring the prosecutor to enter a certified copy of prior convictions with similar names to establish *prima facie* evidence of the Petitioner's identity.

PARTIES TO THE PROCEEDINGS

Petitioner (Defendant below) is Doug E. Jones, an Oklahoma citizen.

Respondent (Plaintiff below) is the State of Oklahoma who brought the criminal charge against Petitioner.

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OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma (App. 1-2) is not published. The judgment of the Oklahoma district court is not published (App. 4-11).

JURISDICTIONAL STATEMENT

The final judgment of the Court of Criminal Appeals of the State of Oklahoma was entered on November 26, 1996. A Petition for Rehearing was not required or filed under Okla. Stat. Ann. tit. 22, § 18 App., Rule 3.14 (West Supp. 1997). This Petition is being filed within 90 days thereafter. The Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

1. U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. U.S. Const. amend. XIV, § 1.

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without Due Process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Okla. Stat. tit. 21, § 51 (1991).

§ 51. Second and subsequent offenses after conviction of offense punishable by imprisonment in state penitentiary

A. Except as otherwise provided in Sections 1 through 7 of this act, every person who, having been convicted of any offense punishable by imprisonment in the State Penitentiary, commits any crime after such conviction is punishable therefor as follows:

1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the State Penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the State Penitentiary for a term not less than ten (10) years.

2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the State Penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the State Penitentiary for a term not exceeding ten (10) years.

3. If such subsequent conviction is for petit larceny, the person convicted of such subsequent offense is punishable by imprisonment in the State Penitentiary for a term not exceeding five (5) years.

B. Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years. Felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time and location. Nothing in this section shall abrogate or affect the punishment by death in all crimes now or hereafter made punishable by death.

STATEMENT

1. Petitioner, an indigent, was charged with felony possession of a controlled substance with enhanced sentencing based upon two prior felony convictions. App. 32-35.

2. At the end of the first phase of the trial, the jury found the Petitioner guilty of the possession charge. The Petitioner was never charged or convicted of drug trafficking. App. 4.

3. During the sentencing phase, the Respondent offered certified copies of two prior judgment and sentencing forms. App. 16-17, 39-44. These forms evidenced convictions against a "Doug Edward Jones" although one of the forms initially identifies the accused and his counsel as

"Woodrow G. Pendergrass." *Id.* The Petitioner in this case is Doug E. Jones. The trial court entered these exhibits into evidence over the objection of Petitioner's court appointed trial counsel. App. 17. The Petitioner offered no evidence concerning the alleged prior convictions. *Id.* The trial court submitted two instructions to the jury concerning minimum sentencing requirements under Oklahoma's enhanced sentencing standards. The first required a term of no less than 10 years if the jury determined that there was one prior felony conviction for the Petitioner and the second required a term of no less than 20 years if the jury found that the Petitioner had two prior felony convictions. App. 36-38.

4. The jury returned a verdict after the sentencing phase recommending a sentence of 101 years and the trial court entered judgment and sentence in conformity with the jury's verdict. App. 4-11.

5. Petitioner's court-appointed appellate counsel timely appealed the judgment on two grounds. App. 15-19. First, on the basis that the introduction of certified copies of the prior convictions without witness testimony violated the Petitioner's Constitutional Rights under the Sixth Amendment and because the prosecution failed to establish his identity as a prior convicted felon for purposes of enhanced sentencing. App. 15-17. Second, that introduction of the "other crimes" evidence constituted error and a breach of the Petitioner's Constitutional rights. App. 17-19. In its responsive brief, the State of Oklahoma only argued that the evidence was sufficient and otherwise properly admitted into evidence. App. 23-26. The Oklahoma Court of Criminal Appeals summarily affirmed the judgment and sentence entered by the trial court. App. 1-2.

DISCUSSION

Oklahoma's judicially sanctioned procedure of deeming the prosecution to have established a *prima facie* case of identity of the defendant for purposes of enhanced sentencing through mere name similarity in certified copies of judgment and sentencing documents violates the Due Process Clause.

The Petitioner is aware that in the case of so-called "recidivist" statutes, this Court is not "a rule-making organ for the promulgation of state rules of criminal procedure," *Spencer v. Texas*, 385 U.S. 554, 564 (1967). This case, however, concerns the abrogation of the constitutionally mandated right of any person charged with a crime to confront his accuser, and the constitutional requirement that the State prove criminal charges beyond a reasonable doubt. The states' interest in deterring repeat offenders cannot be disputed. *Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 522 (1992), *rehearing denied*, 506 U.S. 1087, 113 S.Ct. 1068 (1993). Nor can it be disputed that a large percentage of defendants are repeat offenders. *See id.* Nevertheless, in this case it is imperative that this Court examine an Oklahoma repeat offender evidentiary practice that effectively removes the prosecution's obligation to prove each element of the charge against a defendant.

The Petitioner was convicted after a jury trial of felony possession of a controlled substance (methamphetamine residue) and sentenced to a term of 101 years under Oklahoma's enhanced sentencing statute, Okla. Stat. tit. 21, § 51.[1] The two alleged prior convictions of "Doug Edward

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[1] Petitioner was charged and convicted under Okla. Stat. tit. 63, § 2-402(B)(1) (1991). This offense normally carries a sentence of 2 to 10 years. *Id.* A second or subsequent violation of the section carries a sentence range of 4 to 20 years. *Id.*

Jones" were not sponsored by a live witness at trial, but were offered as self-authenticating documents. The prosecution offered no other evidence of identity; and was thus impermissibly relieved of its burden to prove each element of its enhanced sentencing statute charge against the Petitioner, Doug E. Jones. *See Bouie v. Columbia*, 378 U.S. 347, 354-55 (1964) (holding that the Due Process Clause may preclude a state judiciary from enforcing otherwise valid state statutes). The only matter proven by the two self-authenticated documents was that in 1987 either *a* Doug Edward Jones or *a* "Woodrow G. Pendergrass" was convicted on plea of guilty in Ottawa County, Oklahoma for felony possession of a controlled substance and in 1988 *a* Doug Edward Jones was convicted on plea of guilty in Delaware County, Oklahoma of first degree robbery. These documents do not establish that *the Petitioner*, Doug E. Jones, of Mayes County, Oklahoma was convicted and sentenced for such crimes; the latter being an essential element of the prosecution's charge under the enhanced punishment statute.

Oklahoma courts recognize that the prosecution has the ultimate burden of proof at trial under its enhanced punishment statute, Okla. Stat. tit. 21, § 51 (1991), *Smith v. Oklahoma*, 695 P.2d 1360, 1364 (Okla. Crim. 1985), *overruled on other grounds, Kaulaity v. Oklahoma*, 859 P.2d 521 (Okla. Crim. 1993), and that the prosecution has the burden of proving that the defendant named in the charged information is *the* defendant named on the prior conviction. *Id.* (emphasis added).

The Court in *Williams v. Oklahoma*, 364 P.2d 702 (Okla. Crim. App. 1961), stated the most often cited Oklahoma standard for *prima facie* identification as follows:

> In regard to proof of a former conviction . . . the identity of name of the defendant and the person previously convicted is *prima facie* evidence of identity of person, and, in the absence of rebutting testimony, supports a finding of such identity. This will leave the question of identity to be determined by the jury, after a proper instruction has been given, upon a consideration of all surrounding facts and circumstances, such as commonness or unusualness of the name, the character of the former crime or crimes, and the place of its commission.

Williams, 364 P.2d at 703. In *Cooper v. Oklahoma*, 810 P.2d 1303 (Okla. Crim. 1991), the Court re-examined the above standard and held that Oklahoma law requires more than the simple admission of the prior judgment and sentencing forms with similar names to establish a *prima facie* case, stating that:

> If we do not require more than the introduction of uncorroborated documents, then in effect, we are making the defendant in a second stage prove that he is not such person. The burden of proof is not on the defendant but on the State.

Cooper, 810 P.2d at 1306. However, except in instances of very common names, Oklahoma courts have, in practice, relieved the prosecution of its Constitutional burden, *Cooper* notwithstanding.

The practice in Oklahoma, as exemplified by this case, is actually that described by the Oklahoma Court of Criminal Appeals in *Brown v. Oklahoma*, 578 P.2d 364 (Okla. Crim. 1978):

> [T]he identity of the name of the defendant and that of the person previously convicted is sufficient as prima facie evidence of identity of person *unless the name is so common as to negate the prima facie identification.*

Id. at 366 (emphasis added). In other words, if the names are the same, the court deems that a *prima facie* case is established without *any* additional evidence, unless the name is so common as to negate the presumption. Accordingly, Oklahoma courts have consistently held that the prosecution establishes a *prima facie* case for purposes of Okla. Stat. tit. 21, § 51 upon admission into evidence of certified copies of the prior convictions allegedly naming the current defendant. *See Battenfield v. Oklahoma*, 826 P.2d 612, 614 (Okla. Crim. 1992), *cert. denied*, 503 U.S. 943 (1992); *Garcia v. Oklahoma*, 734 P.2d 825, 825 (Okla. Crim. 1987); *Brown*, 578 P.2d at 365.

The presumption of identity merely based upon name similarity, whether common or not, violates a defendant's Due Process rights by relieving the prosecution of its constitutionally mandated burden of proof as to an essential element of the charge. As contemplated by the *Cooper* Court, Oklahoma's procedure, in fact, *places the burden on the defendant to deny his guilt* under Okla. Stat. tit. 21, § 51 as long as the prosecution can contrive to locate a conviction document from any jurisdiction that bears a name on it similar to that of the defendant. The defendant must then either take the stand to prove a negative (usually in the second phase of trial after he has already been adjudged guilty by the same jury that would then assess his credibility for sentencing purposes) or remain silent in reliance on the Fifth Amendment.

Either choice places the defendant in an untenable situation as his credibility with that jury is already damaged.

The charging information in this case names "Doug E. Jones" as the defendant.[2] App. 32. The first alleged prior conviction exhibit names "Doug Edward Jones" and the second initially states the name of the defendant to be "Woodrow G. Pendergrass", but later adjudicates and sentences "Doug Edward Jones" as the defendant. Though similar, the names are not the same.

In *Brown, supra,* the alleged repeat offender's name was "John Hubert Brown." The prosecution introduced certified copies of three convictions to support enhanced sentencing under Okla. Stat. tit. 21, § 51. One of the convictions contained the same name as that of the defendant: "John Hubert Brown", while the two others named "John H. Brown" as the sentenced defendant. The Oklahoma Court of Criminal Appeals first ruled that the name "John Hubert Brown" was not sufficiently common to negate the *prima facie* identity presumption. *Brown,* 578 P.2d at 366. The Court did not reach the issue of whether the other two convictions were sufficient to trigger a *prima facie* presumption, as the "John Hubert Brown" conviction, without more, sufficed to support the "after prior felony" conviction.

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[2] The Court should not be misled by the ultimate judgment and sentencing document entered in this case, App. 4-11, which purports to list the defendant's name as "Doug E. Jones, a/k/a, Doug Edward Jones." This style first appears in the case on the judgment and sentencing document and is not contained in the Information upon which the trial was based. *See* App. 32-35.

In contrast to the *Brown* opinion, the Court, in *Smith, supra,* squarely held that the name James E. Smith was "far too common a name to establish *prima facie* evidence by 11 year old documents from another state." *Id.* at 1364. Thus, while the name of the defendant was identical to that appearing on the prior conviction forms, the Court nevertheless recognized the overriding concern of establishing the identity of the defendant for purposes of enhanced sentencing requirements and reversed the judgment.

In *Garcia, supra,* the Court stated that Oklahoma law requires the prosecution to establish the defendant's identity under the enhanced sentencing statute and that the jury must consider all the "facts and circumstances" other than mere name similarity. *Id.* at 825. The "facts and circumstances" may be "simply that the defendant has a somewhat unusual name." *Id.* In *Garcia,* the name of the defendant and that of the prior convicted defendant listed on the admitted prior conviction was the same: Kenneth Gilbert Garcia – a far less common name than "Doug E. Jones". The Court found that the prosecution met its burden only because the defendant had an unusual name. *Id.* Even under the *Garcia* facts, however, the prosecution was effectively relieved of its burden to prove that the defendant was *the* defendant previously convicted.

Similarly, the Court in *Battenfield, supra,* upheld a conviction and enhanced sentence based upon the similarity and uniqueness of the defendant's name. *Battenfield,* 826 P.2d at 614. However, the Court stated:

> *We stress, however, that prosecutors shall do more than simply introduce Judgment and Sentence to prove a prior conviction.* In addition to those facts

> and circumstances set forth as examples in *Williams* and *Cooper*, there are a number of possible methods for establishing identity: Fingerprint and photographic evidence of the defendant in the prior case; testimony of jailers, officers, or other personnel connected therewith; and jail or court records detailing personal information about the defendant. . . . We strongly encourage the State to introduce one or more of these, or similar, items of evidence when seeking to prove a prior felony conviction. (Emphasis added.)

Although the *Battenfield* opinion predated the trial and sentencing here at issue by three years, the trial court and appellate court in this case required *none* of the corroborative items discussed in that opinion. This omission is plain error of a constitutional dimension.

In *Gravatt v. United States*, 260 F.2d 498 (10th Cir. 1958), the Tenth Circuit reviewed a case similar to the one at bar, but under federal law. The defendant's name was "Earl Elmer Gravatt" while the prior conviction named defendant "Earl E. Gravatt." The Court held that merely introducing the prior judgment and sentence with the similar name did not discharge the prosecution's burden under applicable federal procedures. *Id.* at 499. In so holding, the Court noted with approval Oklahoma's procedure as stated in *Woods v. Oklahoma*, 327 P.2d 720 (Okla. Crim. App. 1958), a case that pre-dates *Williams, supra*. The *Woods* Court required the prosecutor to (I) introduce the prior information and judgment and sentence, (II) prove that the defendant on trial is the one and the same person as the defendant in the prior conviction, and (III) prove that the judgment and sentence was final. *Woods*, 327 P.2d at 721-22.

A more recent Tenth Circuit case that addressed the constitutionality of the Oklahoma practice complained of in this Petition, *Shaw v. Johnson*, 786 F.2d 993 (10th Cir. 1986), *cert. denied*, 479 U.S. 843 (1986), illustrates the necessity for a Supreme Court pronouncement on this subject. In *Shaw*, the Tenth Circuit reviewed a Petition for *habeas corpus*. The state prosecutor in *Shaw* introduced four prior conviction documents that named "Jackie Ray Shaw" as the convicted defendant which was exactly the name of the accused defendant in the state court case. The State offered no other evidence as to three of the convictions, the only prior alleged convictions addressed in *Shaw*.[3] The Tenth Circuit found that under Oklahoma law, the State establishes a *prima facie* case of identity upon admission of a prior conviction form having the identical name of the accused defendant. *Id.* at 999 (citing *Wilson v. State*, 568 P.2d 1323, 1327 (Okla. Crim. App. 1977); (other citations omitted)). The Court acknowledged that relevant federal practice required, in addition to certified copies of the conviction documents, other substantive evidence to corroborate the certified conviction documents. *Id.* (citing, among others, *Gravatt v. United States*, 260 F.2d 498, 499 (10th Cir. 1958)). But, relying on the United States Supreme Court's opinion in *Spencer, supra*, the Court declined to grant the *habeas* relief requested. *Shaw*, 786 F.2d at 999-1000. The Tenth Circuit, though clearly uncomfortable with Oklahoma practice, stated it was hesitant to invalidate a procedure used not

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[3] The Tenth Circuit deemed the three convictions referenced above as dispositive and therefore did not review the validity of the fourth conviction.

only by Oklahoma courts, but by several other states, *without guidance from the United States Supreme Court or a sister circuit. Id.* at 1000, n. 9 (emphasis added). The *Shaw* Court, moreover, appeared to take comfort in the fact that all three prior convictions occurred in the county of the defendant's residence and that the names on the conviction documents were exactly that of the defendant. *Id.* at 1000. In other words, the *Shaw* Court did not endorse Oklahoma's procedure (under facts that were far less egregious than those at bar), but, under the facts presented, chose to do nothing about it.

The Due Process Clause requires that the prosecution bear the burden of proof on each element of its charge. *Estelle v. McGuire*, 502 U.S. 62, 69 (1991). A state rule violates this constitutional tenet if the prosecution is relieved of its burden on an essential element of the charge. *Patterson v. New York*, 432 U.S. 197, 215 (1977) (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975)). The *Mullaney* Court reviewed a Maine law that shifted the burden of proof to the defendant as to the heat of passion defense in a murder trial. *Mullaney* held that the prosecution was improperly relieved of its burden of proof as to the mental state of the defendant and struck down the Maine law. *Id.* at 703-04. The Court's analysis recognized that the key difference between a conviction for murder and one for manslaughter was the amount of liberty lost by the defendant, as the penalty for manslaughter was much less than that for murder:

> The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differs significantly. Indeed, when viewed in terms of the potential

> difference in restrictions of personal liberty attendant to each conviction, the distinction . . . between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Id. at 689.[4] This Court's opinion in *Mullaney* thus expressly acknowledged that the prosecution's constitutionally required burden includes proof of those facts that may simply go to the amount of punishment ultimately levied against a defendant. The law that this Court struck down in *Mullaney* improperly shifted the burden of proof as to this element and thus violated the defendant's Due Process rights. In *Patterson, supra,* this Court relied on *Mullaney* in holding that a state may not adopt a practice that shifts the burden of proof as to one element of a criminal offense by presuming that ingredient upon proof of the other elements of the offense. *Id.* at 215. The present case presents a plainly analogous situation wherein the State of Oklahoma improperly presumed the identity ingredient of the enhanced sentencing charge.

To summarize, Petitioner in this case was convicted of possession of a minute amount of methamphetamine residue; an offense normally punishable by two to ten years incarceration. By reason of the introduction of certified judgment and sentencing forms bearing the names "Doug Edward Jones" and "Woodrow G. Pendergrass", the Appellant, Doug E. Jones, received a sentence of 101

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[4] As noted earlier, the maximum sentence range for felony possession of methamphetamine was 10 years as opposed to the 101 years Petitioner received under the enhanced sentencing statute.

years in the Oklahoma State Penitentiary system. The United States Constitution mandates more meaningful Due Process where such a staggering forfeiture of liberty is at stake. This matter should be remanded to the Oklahoma Court of Criminal Appeals for further proceedings consistent with Due Process requirements.

The Oklahoma Courts violated the Petitioner's Sixth Amendment right to confront his accuser by presuming identity merely based upon names contained in the certified copies of the prior judgment and sentencing documents.

The Sixth Amendment applies to the states via the Fourteenth Amendment. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

As stated above, the two alleged prior convictions of "Doug Edward Jones" or "Woodrow G. Pendergrass" were admitted on self-authentication, not through a live witness, and no other testimony as to identity was offered in evidence. Obviously, the Petitioner's counsel could not cross-examine the documents on the issues relevant to matters they purport to prove. But most importantly, the Petitioner was denied his right to confront his accuser on the most important element, identity. The Oklahoma presumption of identity based upon mere similarity of name (unless too common) impermissibly bars the Petitioner from confronting his accuser as to an important element of the prior offender charge, i.e.: that he was the one previously convicted. The risk of terrible injustice is exacerbated where, as here, the name of the person charged is, (i) quite common and (ii) similar, but not identical to

the name appearing on the allegedly incriminating documents.

Douglas, supra, arose from the trial of a murder case wherein a police officer read the confession of an alleged accomplice in the murder to the jury. Though not admitted into evidence, the confession tended to implicate the defendant on trial. The accomplice testified at trial, but refused on Fifth Amendment grounds to answer the defendant's counsel's questions concerning the statements in the confession. The Court noted that the accomplice was not subject to cross-examination on the statements in the confession, yet these statements were the only direct evidence that the defendant on trial committed the murder. *Id.* at 419-20. The Court reasoned that the circumstances of the case were such that the jury could infer from the unrefuted statements in the alleged confession that such statements were made and that they were true, despite the fact that no direct evidence was introduced at trial tending to show that the defendant on trial actually committed the murder. *Id.* at 420. The Court held that the officer's reading of the confession violated the defendant's Sixth Amendment right to confront his accuser. *Id.*

In this case, the prosecution offered only certified copies of judgment and sentencing documents from other counties evidencing (i) a name similar to that of the Petitioner and (ii) a name (Woodrow G. Pendergrass) quite different from that of the Defendant. The prosecution offered no other evidence and the jury was invited to conclude from these documents that the Petitioner was the one and the same person convicted in the prior proceedings. Clearly, the defendant could not cross-examine

the documents and no person was offered by the prosecution to corroborate the documents or identify the Petitioner. Accordingly, the Petitioner was completely deprived of any opportunity to confront or cross-examine his accuser as to an essential element of the enhanced sentencing statute.

These facts are analogous to those in *Douglas* where the jury was allowed at trial to infer from the reading of a document (though not admitted into evidence) that the defendant on trial was the defendant that committed the murder. The defendant in *Douglas* was deprived of his right to confront the accuser as to this essential element of the charge. Similarly, the jury in this case was allowed to infer that the Petitioner was the one and the same defendant listed in the prior convictions, yet the Petitioner could not cross-examine or confront his accuser as to that element of the enhanced sentencing charge.

Because the Petitioner was deprived of his Constitutional right to confront his accuser as to the element of identity, this case should be remanded to the Oklahoma Court of Criminal Appeals with instructions to remand the case for further proceedings at the state district court level consistent with the Constitutional guaranties of the Sixth Amendment.

CONCLUSION

The judicially sanctioned procedure of allowing the prosecution to establish a *prima facie* case for enhanced punishment under Okla. Stat. tit. 21, § 51 upon admission into evidence of merely certified copies of prior judgment and sentencing documents not only relieved the prosecution of its constitutionally mandated burden of proof, thus violating the Petitioner's rights in that regard, but also prevented the Petitioner from his Sixth Amendment right to confront his accuser as to the essential element of identity. Accordingly, Petitioner respectfully requests that the Court remand this case to the Oklahoma Court of Criminal Appeals with instructions to remand the case to the state district court for further proceedings regarding sentencing consistent with the applicable Due Process and Confrontation Clause requirements.

Dated this 24th day of February, 1997.

Respectfully submitted,

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DOUG JONES, Appellant, v. STATE OF OKLAHOMA, Appellee.	)))))))	**NOT FOR PUBLICATION** Case No. F-96-76

SUMMARY OPINION

(Filed Nov. 26, 1996)

LUMPKIN, JUDGE:

Appellant Doug Jones was tried by jury and convicted of Possession of a Controlled Dangerous Substance, After Former Conviction of Two Felonies (63 O.S. 1991, §2-401), Case No. CF-95-60, in the District Court of Mayes County. The jury recommended as punishment one hundred and one (101) years imprisonment. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. The State failed to prove that Appellant had been previously convicted of two or more felonies.

II. The trial court erred in allowing introduction of evidence of other crimes.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we

have determined that neither reversal nor modification is warranted under the law and the evidence. Accordingly, this appeal is denied.

DECISION

The Judgment and Sentence is **AFFIRMED.**

AN APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY THE HONORABLE W.M. THOMAS, ASSOCIATE DISTRICT JUDGE

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ASSISTANT ATTORNEY GENERAL
ROOM 112, STATE CAPITOL
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY:
LUMPKIN, J.
JOHNSON, P.J.: CONCUR
CHAPEL, V.P.J.: CONCUR
LANE, J.: CONCUR
STRUBHAR, J.: CONCUR

IN THE DISTRICT COURT OF
MAYES COUNTY, OKLAHOMA
STATE OF OKLAHOMA

STATE OF OKLAHOMA, PLAINTIFF, -vs- DOUG E. JONES aka DOUG EDWARD JONES, DEFENDANT.	NO.: CF-95-60 DOB: 7/22/63 SS# 443-74-6563

JUDGMENT AND SENTENCE

(Filed Jan. 23, 1996)

NOW, on this 16th day of January, 1996, this matter comes on before the undersigned Judge, for sentencing and the defendant, DOUG E. JONES aka DOUG EDWARD JONES, appears personally and with Counsel Al Benningfield, the State of Oklahoma represented by Charles A. Ramsey, and the defendant, having previously:

( ) Entered a plea of guilty

( ) Entered a plea of Nolo Contendere

(x) Found guilty by jury

( ) Found guilty by Judge after waiver of jury trial

to/of the crime(s) of:

Statutory Reference
63-2-402 (B-1)

Count I: UNLAWFUL POSSESSION OF CONTROLLED DRUG (METHAMPHETAMINE)

(x) The Court finds the defendant has prior felony convictions and this sentence has been enhanced in accordance with the provisions set forth in 21 O.S. 51, and,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, DOUG E. JONES aka DOUG EDWARD JONES, is guilty of the above described offense and is sentenced as follows:

TERM OF IMPRISONMENT

COUNT	SENTENCED TO A TERM
I	101 Years in the Department of Corrections

under the custody and control of:

(x) Oklahoma Department of Corrections;

( ) the Mayes County Sheriff; or

( ) other: _____.

These terms to be served as follows (CONCURRENT/ CONSECUTIVE):

TERMS OF IMPRISONMENT WITH EXECUTION OF SENTENCE SUSPENDED IN PART

COUNT	SENTENCED TO A TERM OF

with all except the first _____ under the custody and control of:

( ) Oklahoma Department of Corrections; or

( ) the Mayes County Sheriff,

pursuant to the rules and conditions of probation entered by the Court.

These terms to be served: ( ) concurrently, or ( ) consecutively.

TERMS OF IMPRISONMENT WITH EXECUTION OF SENTENCE SUSPENDED

COUNT SENTENCED TO A TERM OF

under the custody and control of:

( ) Oklahoma Department of Corrections; or

( ) the Mayes County Sheriff,

all of said term(s) of imprisonment suspended pursuant to the rules and conditions of probation entered by the court.

These terms to be served: ( ).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that in addition to the preceding terms, the Defendant is also sentenced to:

- FINE -

( ) The defendant shall pay a fine of $ _____;

( ) immediately; or

( ) on or before ___, 19___ at the rate of $ ___ per ___, or within ___ days of release from the Department of Corrections.

( ) payment of $ ___ is suspended pursuant to Rules and Conditions of Probation.

COSTS, VCA, RESTITUTION

(X) The defendant shall pay costs, fees, and restitution i [sic] accordance with the schedule attached as Exhibit A. Defendant is assessed a VCA of $25.00 plus court costs taxed in the amount of $ 708.00, for which judgment is hereby rendered against the Defendant.

RULES AND CONDITIONS OF PROBATION

The rules and conditions of probation as ordered by the court and signed by the defendant, acknowledging his understanding of the rules and conditions, are incorporated as Exhibit ___.

ATTORNEY FEES

( ) The defendant shall pay court-appointed attorney fee in the amount of $ ___ on or before ___, 19___, to ___.

HEARING ON ABILITY TO PAY AFTER INCARCERATION

(x) The defendant shall report to the District Court of Mayes County within 30 days of release for a hearing on the defendant's ability to pay fines and costs pursuant to Section VIII of the Rules of the Court of Criminal Appeals, 22 O.S., Ch 18, App.

IT IS FURTHER ORDERED, that judgment is hereby entered against the Defendant as to the fines, costs and assessments set forth above.

The Court further advised the Defendant of his rights to appeal to the Court of Criminal Appeals of the State of Oklahoma, and of the necessary steps to be taken by his to perfect such appeal, and that if he desired to appeal and was unable to afford counsel and a transcript of the proceedings, that the same would be furnished by the State without cost to him.

In the event the above sentence is for incarceration in the Department of Corrections, the Sheriff of Mayes County, Oklahoma, is ordered and directed to deliver the Defendant to the Lexington Assessment and Reception Center at Lexington, Oklahoma, and leave therewith a copy of this Judgment and Sentence to serve as warrant and authority for the imprisonment of the Defendant as provided herein. A second copy of this Judgment and Sentence to be warrant and authority of the Sheriff for the transportation and imprisonment of the Department as herein before provided. The Sheriff to make due return to the Clerk of this Court, with his proceedings endorsed thereon.

Witness my hand the day and year first above mentioned.

/s/ W.M. Thomas
W. M. THOMAS,
ASSOCIATE JUDGE OF THE
DISTRICT COURT

(SEAL)
ATTEST:

/s/ Karin Garland COURT CLERK

/s/ Regina Harris DEPUTY CLERK

CLERK'S CERTIFICATION OF COPIES

I, Karin Garland, Clerk of the District Court of Mayes County, State of Oklahoma, do hereby certify the foregoing to be true, correct, full and complete copy of the original Judgment and Sentence in the case of the State of Oklahoma vs. DOUG E. JONES aka DOUG EDWARD JONES, as the same appears of record in my office.

Witness my hand and official seal this ___ day of ___, 1996.

KARIN GARLAND,
COURT CLERK

DEPUTY COURT CLERK

SHERIFF'S RETURN

I received this Judgment and Sentence the ___ day of ___, 1996, and executed it by delivering the Defendant to the Warden of the Lexington Assessment and Reception Center at Lexington, Oklahoma, on the ___ day of ___, 1996. I also certify the above prisoner has served ___ days in the County Jail on the present charge or charges.

HAROLD BERRY, SHERIFF

BY: _____,
Deputy Sheriff

IN THE DISTRICT COURT OF MAYES COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, PLANTIFF [sic]	)	
vs.	)	CASE NUMBER: CRF 95-60
Doug E. Jones aka Doug Edward Jones, Defendant.	)	
(DOB: 07-22-63)	)	

ATTACHMENT "A"

The Defendant, Doug E. Jones aka Doug Edward Jones is ordered by the attached Judgement and Sentence to repay the Court Fund of Mayes County the following dollar amounts representing fines, costs and assessments resulting from his/her conviction. Monies collected shall be applied to the balance due in the order of priority listed on this Attachment. All fines, costs and assessments are due and owing from the date of Sentencing and must be paid full within 30 days of release or the Defendant must reappear in this Court for further proceedings. Costs, such as appellate proceedings and transportation costs, may continue to accrue after judgement and sentence. Additional costs may be certified by the Court Clerk as they accrue.

Schedule of Reimbursement

1. Court Costs	$ 248.00
2. Fines	$ -0-

3.	Attorney Fees	$ -0-
4.	CLEET	$ 7.00
5.	OSBI Lab Fees	$ 150.00
6.	County Sheriff	$ 303.00
7.	Victim's Compensation	$ 25.00
8.	Restitution	$ -0-
9.	Drug Abuse Ed & Treatment Fund	$ -0-
	TOTAL	$ 733.00

/s/ W.M. Thomas
Judge of the District Court

I certify that the foregoing figures are true and accurate to the best of my knowledge.

Karin Garland, Court Clerk

/s/ Lori Parsons
Deputy

Date: 1-18-96

IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DOUG JONES APPELLANT,	)	
vs.	)	F-96-76
STATE OF OKLAHOMA, APPELLEE.	)	

APPELLANT'S BRIEF IN CHIEF

ON APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY

W.M. THOMAS, JUDGE

(Filed Jul. 24, 1996)

James Hughes, OBA #013549
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Oklahoma City, Oklahoma 73102
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July, 1996

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IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DOUG JONES	)	
APPELLANT,	)	
	)	F-96-76
vs.	)	
STATE OF OKLAHOMA,	)	
APPELLEE.	)	

APPELLANT'S BRIEF IN CHIEF

COMES NOW the Appellant, Doug Jones, and submits this brief in support of his petition in error.

SUMMARY OF CASE

Jones was charged by "bindover information" with possession of methamphetamine in CF-95-60 in the District Court of Mayes County, Oklahoma. He was convicted after a jury trial. After a two-stage proceeding in which the jury found that Jones had previously been convicted of two or more felonies and was sentenced to one hundred and one years.

STATEMENT OF FACTS

Law enforcement officers went to Defendant's residence on February 21, 1995. One of the law enforcement officers told the Defendant that they believed that drugs were present in the house [Tr. 163] and they requested the right to search the house [Tr. 163].

A room by room search was conducted. Paraphernalia was found in the master bedroom. Officers also

found a dresser in a closet. In the dresser, officers found two table spoons with an off-color milky film, a film canister with clear liquid and a mirror in the top drawer [Tr. 167].

Officers also found a small caked area on the dresser [Tr. 174]. A field test kit showed that this area tested positive for methamphetamine [Tr. 176]. Officers also fund a syringe with liquid in a wicker basket on top of a dresser in the master bedroom [Tr. 193]. The wicker basket contained, inter alia, hair brushes [Tr. 197].

Coral Jones, wife of the Defendant, testified that Defendant kept his drugs in the top dresser drawer in the closet [Tr. 208]. She claimed that she used the needle found in the basket approximately one or two weeks previous to the arrest and had washed it out [Tr. 210-211].

The liquid in the spoons and film canister did not test positive for any illegal substances [Tr. 212]. Methamphetamine was present in the syringe [Tr. 218].

SUMMARY OF ISSUES

1. Did the State present evidence sufficient to sustain a conviction for possession of methamphetamine after conviction of two or more convictions?

2. Did the Trial Court err by allowing "other crimes" evidence?

ARGUMENT AND AUTHORITY

I. THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO DEMONSTRATE THAT DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES.

A.

Theory

21 O.S. sec. 51 provides for enhanced punishment if a convicted defendant had previously been convicted of felony offenses. If the defendant had previously been convicted of two or more offenses, then the defendant is subject to a range of punishment starting at twenty years imprisonment. 21 O.S. sec. 51(c).

In order to provide the existence of prior felonies, the State may introduce certified copies of prior judgment and sentences. *Fogle v. State*, 700 P.2d 208 (1985). These copies must show that a defendant with a "similar" name was previously convicted of a felony. *Cardenas v. State*, 695 P.2d 876 (1985). The above evidence constitutes a prima facie case. *Fogle, supra, Cardenas, supra.*

B.

Application

In the instant case, the District Attorney introduced certified copies of prior judgment and sentences from other counties which showed a name similar to the Defendant's [Tr. 259-260].

Defense counsel objected to the introduction of this evidence [Tr. 260]. No official from those counties testified. No "pen packs" were introduced. No one identified the Appellant as the same "Doug Jones" who as [sic] convicted in those cases.

Appellant contends that this evidence is insufficient to sustain a conviction for any felony after former conviction. Any other conclusion would violate several parts of the United States Constitution.

The Court should note that allowing a conviction solely on the basis of documents which were not sponsored by *any witness* violates the confrontation clause of the United States Constitution. See. e.g. *Ohio v. Roberts,* 448 US 56 (1980). Appellant cannot cross-examine a document. Appellant cannot ask the document how it was prepared. Appellant cannot ask the document if the county's records are accurately maintained. The use of a document *without* a witness to explain how the document was generated would allow the State to convict a person *without* allowing him to confront his accusers. As such, this is a clear violation of the 6th amendment. Accordingly, Appellant contends that this Court's previous rulings cannot be stretched this far.

II. THE TRIAL COURT ERRED BY ALLOWING INTRODUCTION OF "OTHER CRIMES" EVIDENCE.

A.

Theory

It is a well established principle of American jurisprudence that a criminal defendant must be convicted, if

at all, of the crime listed in the information. *Burks v. State*, 594 P.2d 771 (Okl. Cr. 1979). While evidence of other crimes may be introduced in certain situations, as a general rule, evidence of other crimes cannot be introduced to prove that the defendant acted in conformity with past behavior. *Burks*, supra, 12 O.S. sec. 2404 (b).

In evaluating whether a given piece of evidence should be admitted, the Court should consider not only whether an exception applies, but also whether the prejudicial effect of the evidence outweighs the probative value of the evidence. 12 O.S. sec. 2404 (b).

B.

Application

The Government introduced evidence which claimed that the Defendant and his wife organized a "dope buying" trip to California. According to this evidence, Defendant planned to sell some of the dope and use the rest.

This evidence should not have been admitted. The probative value of this evidence to this was nil. The relationship between the "California buying trip" and Defendant's "personal drug use" is tenuous at best. Whether Defendant is a drug dealer is not indicative of whether he also uses drugs. [Tr. 205].

The prejudicial effect of this evidence is overwhelming. This evidence claimed that the Defendant was a drug dealer. The District Attorney used the evidence in his closing argument [Tr. 239]. The District Attorney referred to Defendant as a "drug dealer".

It cannot reasonably be disputed that a jury would react more negatively to a "drug dealer" than just a user. Users are the problem. Dealers are the cause of the problem. Use of the "drug dealer" analogy was bound to inflame the jury and increase the sentence imposed.

Appellant's position is supported by *Blakely v. State*, 842 P.2d 1156 (Okl. Cr. 1992). In *Blakely*, the State introduced evidence of a prior possession of drugs in a current possession case. This Court ruled that the evidence should not have been admitted when it wrote that:

> "Rather, there are no facts linking the two crimes beyond the fact that in each case the appellant was apprehended near a baggie containing crack cocaine. There is no evidence that the cocaine was obtained from the same source, no evidence establishes a similar *modus operandi*, no peculiar or unique facts create a signature. In short, the only relevancy of the September 1988 incident to the May 1989 incident is that since the appellant distributed crack cocaine in the past he knew how to do it and may have been doing it in May 1989. The minimal relevancy raises the possibility that the evidence is not really offered for a proper purpose, but for the improper purpose under Section 2404 (b) that the appellant's true character was revealed in September 1988, and he acted consistently therewith in May 1989.

CONCLUSION

The State did not present evidence sufficient to sustain its constitutionally mandated burden of proof. The

introduction of other crimes evidence severely prejudiced Defendant's case.

/s/ James Hughes
James Hughes, OBA #013549
217 N. Harvey, Suite 401
Oklahoma City, Oklahoma 73102
(405) 235-1231

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of July, 1996, a true and correct copy of the above document was delivered to:

Attorney General's Office
by leaving a copy with the Court Clerk
of the Court of Criminal Appeals

and

Appellant, Doug Jones
by mailing a copy to
Appellant's last known address

/s/ James Hughes
James Hughes

dnphughes.brf

App. 21

No. F-96-76

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DOUG JONES,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

BRIEF OF APPELLEE
FROM MAYES COUNTY DISTRICT COURT
CASE NO. CF-95-60

(Filed Sep. 23, 1996)

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

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ATTORNEYS FOR APPELLEE

SEPTEMBER, 1996

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DOUG JONES, Appellant,	)	
v.	)	Case No. F-96-76
THE STATE OF OKLAHOMA, Appellee.	)	

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Doug Jones, hereinafter referred to as the defendant, was tried by jury for the crime of Possession of a Controlled Dangerous Substance after former conviction of two or more felonies in violation of 63 O.S.1991, § 2-401, in Case No. CF-95-60 in the District Court of Mayes County before the Honorable W. M. Thomas, Judge. The defendant was represented by counsel. The jury returned a verdict of guilty and set punishment at one-hundred and one (101) years imprisonment. The trial court sentenced the defendant in accordance with the jury's verdict. From this Judgment and Sentence, the defendant has perfected his appeal to this Court.

STATEMENT OF FACTS

On February 21, 1995, law enforcement officials came into contact with Coral Jones, the defendant's wife, as she was traveling back to Oklahoma after purchasing drugs

in California (Tr. 158-159). Based upon information given to them by Mrs. Jones, Investigator Roy Dowden of the Mayes County District Attorney's Office, Officer Albert McKee of the Adair Police Department, and State Parole Officer Allen McClung went to the defendant's residence. After obtaining the defendant's consent to search the dwelling, the officers went inside (Tr. 163-164). In the master bedroom of the residence, the officers found various items of drug paraphernalia, including two spoons with a milky residue on them, a gray plastic film canister filled with water, and a mirror (Tr. 167). Additionally, the officers seized a syringe which according to lab analysis contained methamphetamine (Tr. 176-177).

Other facts will be presented as they become relevant to this appeal.

PROPOSITION I

THE EVIDENCE OF THE DEFENDANT'S FORMER CONVICTIONS WAS SUFFICIENT AND PROPERLY ADMITTED.

In his first proposition of error, the defendant contends that insufficient proof of his prior convictions was presented to make him eligible for sentence enhancement under 21 O.S.1991, § 51. The defendant's argument, however, concentrates on the proposition that because the evidence presented consisted only of certified copies of judgments and sentences from other counties, the defendant was denied his right to confrontation in violation of the Sixth Amendment of the Constitution. The defendant's theory is that he cannot cross-examine a document

(i.e. inquire if the county from which the document came properly maintains its records.)

The Sixth Amendment requires that one accused of a crime be confronted with the witnesses against him. The defendant would have the definition of "witness" extended to include documents. Black's defines a witness as one who, being present, personally sees or perceives a thing; a beholder, spectator, or eyewitness who is called to testify before the court to what he has seen, heard, or otherwise observed. *Black's Law Dictionary* at 1603 (1990). Clearly, this definition of "witness," as well as the commonly understood meaning of the word, includes only people. As such, a document cannot be properly called a "witness." Therefore, the plain language of the Constitution does not require that one have a right to confront a document.

If the defendant's argument is that the certified copies of the former judgments and sentences were not properly authenticated by a sponsoring witness, we need to search no further than the Oklahoma Evidence Code, 12 O.S.1991, §§ 2902, 3005. While these statutes address the question of admissibility of evidence, this issue necessarily includes the inherent reliability and trustworthiness of a document. Section 2902 explicitly states that certain documents are self-authenticating. This includes documents containing the seal and/or signature of a public official and certified copies of official public records.

Since the defendant's concern according to his brief seems to be that the documents admitted to show prior convictions may have been the product of haphazard record-keeping rather than any mistake in identification,

§ 2902 of the Oklahoma Evidence Code is a legislative determination that the documents such as the judgments and sentences admitted here are inherently reliable and do not require a sponsoring witness. Therefore, the defendant cannot maintain that he was denied the right to "confront his accusers."

In *Garcia v. State*, 734 P.2d 820 (Okl.Cr.1987), the defendant complained that insufficient evidence was presented concerning his prior convictions to warrant enhancement under the Habitual Criminal Act. This Court held that the certified copies of the prior judgments and sentences from Colorado was sufficient evidence to support sentence enhancement. *Id.* at 825. in *Garcia*, however, the issue was the identity of the defendant. Here, the defendant does not raise the issue of identity. Rather, he questions the integrity of the documents that were used for enhancement purposes. As previously stated, documents such as certified copies of judgments and sentences from other counties are deemed to be inherently reliable under the Oklahoma Evidence Code. Accordingly, the defendant's first assignment of error should fail.

PROPOSITION II

EVIDENCE OF THE DEFENDANT'S DRUG SALE ACTIVITY WAS PROPERLY ADMITTED UNDER 12 O.S.1991, § 2404(B).

In his second proposition of error, the defendant contends that evidence admitted at trial that the defendant and his wife were involved in drug dealing was unduly prejudicial and was prohibited under *Burks v. State*, 594 P.2d 771 (Okl.Cr.1979) and 12 O.S.1991, § 2404.

The State elicited testimony from the defendant's wife that she was returning from a drug buying trip to California at the time she was arrested. This evidence was brought out during direct examination of Mrs. Jones. Mrs. Jones testified that she was stopped by the police in Adair on February 21, 1995 while enroute from California on a drug-buying trip (Tr. 202-203). She further testified that she was asked by her husband – the defendant – to make the trip (Tr. 204-205). According to Mrs. Jones, she and the defendant planned to use some of the drugs and sell the rest (Tr. 206). Information from Mrs. Jones led to the arrest of the defendant in their home.

The State's reason for introducing this evidence was not to paint a picture of the defendant as a drug dealer. Rather, the State introduced the evidence under one of the clear exceptions of § 2404. Subparagraph B of § 2404 states clearly that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. **It may, however, be admissible for other purposes, such as proof of motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident** (emphasis added.)

Of the five enumerated exceptions to the prohibition of other crimes evidence, at least one – absence of mistake or accident – is applicable here. During opening statements, defense counsel stated that he believed the evidence would show that the location of the drugs in the defendant's home would demonstrate that they actually belonged to his wife (Tr. 150-151). Again, during cross

examination of Albert McKee of the Adair Police Department, defense counsel inquired whether the officer saw items that looked like they belonged to a female on the dresser where the drugs were seized (Tr. 196-197). Clearly, defense counsel was attempting to lay the blame for the methamphetamine in the home on the defendant's wife. By eliciting the testimony from Mrs. Jones that she had been on a trip to purchase methamphetamine **at the direction of the defendant,** the State was merely presenting evidence that the discovery of the drugs found in the defendant's home and his possession thereof was not an accident or a mistake on his part.

In *Hodge v. State,* 761 P.2d 492 (Okl.Cr.1988) the trial court allowed cross-examination of the defendant's mother that the defendant had a history of heroin abuse. The mother had previously testified that the defendant was wearing the mother's coat at the time of the defendant's arrest. Inside the coat officers had found Percodan and the defendant was charged with illegal possession thereof. *Id.* at 495. The defendant complained on appeal that the mother's testimony of the defendant's heroin addiction was impermissible under Section 2402 of the Oklahoma Evidence Code.

This Court held the evidence of the heroin use admissible under the exception found in § 2404(B) of the Oklahoma Evidence Code because the defendant's theory of defense was that her possession of the Percodan was an accident or simply a mistake due to the fact that the coat was her mother's. *Id.* Likewise, in the present case, the evidence that the defendant was involved in the sale and use of methamphetamine was also presented to rebut the

defendant's insinuations that the presence of the drugs in the defendant's home was accidental.

The defendant also points to the State's closing argument in support of his proposition, stating that the prosecution referred to him as a "drug dealer." The State fails to find this term in the trial court transcript. The prosecution did state in its closing argument that it felt that it had shown that the defendant not only used methamphetamine, but also sold it (Tr. 237). However, the defendant did not object to the prosecutor's statement and, as such, this Court will only review the comment for plain error. The State maintains that the statement was a fair comment on the evidence presented and did not rise to the level of plain error. *See Smallwood v. State*, 907 P.2d 217, 229 (Okl.Cr.1995).

The defendant cites *Blakely v. State*, 841 P.2d 1156 (Okl.Cr.1992), a case in which the trial court admitted evidence of the defendant's arrest for possession of crack cocaine which had occurred nine months prior to the arrest for possession of a controlled dangerous substance which gave rise to the defendant's conviction. *Id.* at 1157. In *Blakely*, this Court held that the evidence of the previous arrest was of little relevance because there was no link between that arrest and the present crime. Although the lapse in time between the prior arrest and the crime charged was not dispositive, the Court found that no evidence was presented that the drugs charged in the case on appeal and those involved in the previous arrest had come from the same source or that the defendant had used a similar modus operandi in both instances. *Id.* at 1159. Accordingly, the admission of the arrest violated 12 O.S.1991, § 2404.

In the present case, the evidence of the Mrs. Jones' drug-buying trip which was made at the defendant's direction was relevant to refute the defendant's assertions that his wife was actually the responsible party. Additionally, the evidence was not that of a prior instance of criminal activity admitted to show that the defendant was acting in conformity therewith in the present matter, as was the case in *Blakely*. Rather, the evidence consisted of an ongoing and continuous illegal activity in which the defendant was involved. This evidence demonstrated that the discovery of the drugs found in the defendant's home and his possession thereof was not an accident or a mistake on his part simply because the evidence also showed that Mrs. Jones was a drug user as well, as the defendant's theory of defense sought to show.

The evidence of Mrs. Jones' trip to California at the defendant's direction, which necessarily included evidence that the defendant was involved in the sale of drugs, was properly admitted under 12 O.S.1991, § 2404(B) to rebut the inference that the methamphetamine found in the defendant's home was actually the property of his wife. Neither reversal of conviction nor modification of sentence is warranted.

CONCLUSION

The defendant's contentions have been answered by both argument and citations of authority. The State contends that no error occurred which would require reversal, modification of sentence, or a new trial. Therefore,

the State respectfully requests that the judgment and sentence be affirmed.

Respectfully submitted,

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF
OKLAHOMA

/s/ Alecia A. George
ALECIA A. GEORGE, OBA #13566
ASSISTANT ATTORNEY GENERAL

2300 N. Lincoln Blvd.
State Capitol Building, Room 112
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR APPELLEE

CERTIFICATE OF MAILING

On this ___ day of September, 1996, a true and correct copy of the foregoing was mailed to:

James Hughes
217 N. Harvey, Suite 401
Oklahoma City, Oklahoma 73102

/s/ Alecia A. George
ALECIA A. GEORGE

IN THE DISTRICT COURT OF MAYES COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff, -vs- DOUG E. JONES, DOB: 7-22-63 SS# 443-74-6563 Defendant.	**INFORMATION** UNLAWFUL POSSESSION OF CONTROLLED DRUG 63-2-402 (B-1) (Filed Feb. 23, 1995) (AFCF) CASE NO. CF-95-60

THAT GENE HAYNES, the duly qualified and acting District Attorney for Mayes County, Oklahoma, who prosecutes in the name and by the authority of the STATE OF OKLAHOMA, comes now into the District Court of Mayes County, State of Oklahoma, and gives the Court to understand and be informed that:

DOUG E. JONES,

On or about the 21st day of February, 1995, in Mayes County, State of Oklahoma and within the jurisdiction of this Court, DOUG E. JONES, did unlawfully, willfully, knowingly or intentionally and feloniously have in his possession and under his control METHAMPHETAMINE, said drug being classified as a controlled dangerous substance in Schedule II of the Uniform Controlled Dangerous Substances Act of this State,

contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the State.

GENE HAYNES,
DISTRICT ATTORNEY

BY: /s/ Charles Ramsey
Assistant District
Attorney

STATE OF OKLAHOMA)
COUNTY OF MAYES) SS.

I, Albert McKee, being duly sworn on oath, say that the statements set forth in the above information are true.

/s/ Albert McKee

Subscribed and sworn to before this 23rd day of February, 1995.

My Commission Expires: 10-12-98

/s/ Illegible
NOTARY PUBLIC

WITNESSES:
Albert McKee, Adair Police Department, Adair, OK
Roy Dowden, DA Investigator, DA's Office, Claremore, OK
Allen McClung, Probation & Parole, Pryor, OK
Chemist, OSBI LAB, Tahlequah, OK

THE STATE OF OKLAHOMA,
Plaintiff,
-vs-
DOUG E JONES,
dob: 7-22-63 SS# 443-74-6563
Defendant.

CF-95-60

The State further alleges that the said **DOUG E. JONES**, was heretofore on the 12th day of September, 1988, in Case No. CRF-88-0081 in the District Court of Delaware County, State of Oklahoma, convicted of the offense of **ROBBERY FIRST DEGREE**, and sentenced to a term of Fifteen (15) Years in the Department of Corrections to serve. Said Defendant being present in Court and with Counsel and said judgment being the final order of the Court.

The State further alleges that the said **DOUG E. JONES**, was heretofore on the 10th day of April, 1987, in Case No. CRF-86-184 in the District Court of Ottawa County, State of Oklahoma, convicted of the offense of **UNLAWFUL POSSESSION OF CONTROLLED DRUG**, and sentenced to a term of Two (2) Years in the Department of Corrections, all suspended. Said Defendant being present in Court and with Counsel and said judgment being the final order of the Court.

contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the State.

GENE HAYNES,
DISTRICT ATTORNEY

BY: /s/ Charles Ramsey
Assistant District
Attorney

WITNESSES:
Court Clerk of Delaware County, Jay, OK
Court Clerk of Ottawa County, Miami, OK

INSTRUCTION NO. 22

In this case the State of Oklahoma alleges former felony convictions as the basis for enhancement of the punishment, such allegations on the Second Page of the Information is like any other allegation in a criminal case. The burden is on the State of Oklahoma to establish this fact or facts to your satisfaction beyond a reasonable doubt.

Instructions for Phase II – Punishment

(Filed Jan. 9, 1996)

State of Oklahoma,
Plaintiff CF-95-60

vs.

Doug E. Jones,

Defendant.

INSTRUCTION NO. 23

You are instructed that by a Second Page to the Information field in this case, the State of Oklahoma has alleged that the Defendant, Doug E. Jones, had, prior to the commission of the crimes charged herein on the First Page of the Information, two previous felony convictions, to-wit:

On the 12th day of September, 1988, in Case No. CRF-88-0081, in the District Court of Delaware County,

State of Oklahoma, was convicted of the offense of Robbery, First Degree. Said Defendant being present in Court and with Counsel and said Judgment being the final order of the Court.

On the 10th day of April, 1987, in Case No. CRF-86-184, in the District Court of Ottawa County of, State of Oklahoma, was convicted of the offense of Unlawful Possession of Controlled Drug. Said Defendant being present in Court and with Counsel and said Judgment being the final order of the Court.

INSTRUCTION NO. 24

In this case, the State of Oklahoma, has the burden of proof to establish that this defendant, Doug E. Jones, has had one or more subsequent felony convictions. If you find that the State has failed in this regard, then you verdict should be to assess the punishment of this defendant for the crime of Unlawful Possession of a Controlled Substance, (Methamphetamine). Unlawful Possession of a Controlled Substance, (Methamphetamine), is punishable by imprisonment for not less than two (2) years nor more than ten (10) years in the State Penitentiary.

In the event that you find that this defendant, Doug E. Jones, has been convicted heretofore of one felony case, then you are instructed that you should assess a punishment of not less than ten (10) years in the State Penitentiary.

In the event that you find that this defendant, Doug E. Jones, has been convicted heretofore of two felony cases, then you are instructed that you should assess a punishment of not less than twenty (20) years in the State Penitentiary.

Instruction No. 25

You will now listen to argument of counsel as to punishment. Your verdict must be unanimous.

Dated this 9 day of January, 1995.

/s/ W. M. Thomas
W. M. Thomas

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF OKLAHOMA SITTING IN AND FOR OTTAWA COUNTY, OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	No. CRF-86-184
-vs-	)	
DOUG EDWARD JONES	)	
Defendant	)	

JUDGMENT AND SENTENCE SUSPENDED ON PLEA OF GUILTY

NOW, on this 8th day of April, 1987, the same being a juridicial day of said court, the time duly appointed for judgment in the above entitled cause, and said cause coming on for judgment and the Defendant WOODROW G. PENDERGRASS, being personally present in open court and being duly represented at all appearances before the court by his attorney of record, WOODROW G. PENDERGRASS, and having been legally charged with the offense of UNLAWFUL POSSESSION OF CONTROLLE [sic] DRUG and having been duly informed of the nature of the charge and having been duly arraigned thereon, having duly and properly entered his plea of Guilty to the crime of UNLAWFUL POSSESSION OF CONTROLLED DRUG, after having been duly advised of his rights and the effect of such plea; and it appearing to the court that said defendant is of the age of 23 years; and the defendant having been asked by the Court whether he has any legal

cause to show why judgment and sentence should not be pronounced against him, he stating no sufficient cause why judgment and sentence shoud [sic] not be pronounced against the defendant, and none appearing to the Court, it is the Judgment of the Court that said defendant is guilty of the crime of UNLAWFUL POSSESSION OF CONTROLLED DRUG

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that DOUG EDWARD JONES is sentenced to a term of TWO (2) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections, Oklahoma State Penitentiary at Lexington, Oklahoma, pursuant to the Oklahoma Corrections of 1967 and pursuant to the rules of said Department, for the crime of UNLAWFUL POSSESSION OF CONTROLLED DRUG said term of sentence to begin at and from the delivery of the defendant to Warden of the State Penientiary [sic] at Lexington, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at $_____ for which judgment is hereby rendered against the defendant and thereupon the defendant is by the Court notified of his right of appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that this judgment and sentence shall be Suspended pursuant to the provisions of the Oklahoma Corrections Act of 1967, and pursuant the rules of the Department Corrections of the State of Oklahoma.

IT IS THEREFORE, the decision of this Court that a motor vehicle was not used in the commision [sic] of this felony.

IT IS FURTHER ORDERED that said defendant is to pay court costs of the actions by April 8, 1988.

IT IS FURTHER ORDERED that said defendant will reinburse [sic] Court Fund for Court Appointed Counsel in the amount of $275.00 by April 8, 1988. That said defendant is to serve 100 hours of community service to be supervised.

ATTEST: by NOCA with said defendant to report to NOCA wihtin [sic] 3 days from illegible of plea COURT CLERK, EARL GONCE

By: /s/ Anita Craft
Deputy

/s/ Joseph Illegible
DISTRICT JUDGE

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

Plaintiff,

No. CRF-88-81

-vs-

DOUG EDWARD JONES,

Defendant.

JUDGMENT AND SENTENCE ON PLEA OF GUILTY

NOW, on this 12th day of September, 1988, the same being a juridicial day of said court, and the time duly appointed for judgment in the above cause, and the defendant, DOUG EDWARD JONES, being personally present in open court, and being duly represented at all appearances before the court by his attorney of record, DICK LOCK, and having been legally charged with the offense of ROBBERY, FIRST DEGREE, A.F.C.F., and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly entered his plea of guilty to the crime of ROBBERY, FIRST DEGREE, and having been advised of his rights and the effect of such plea; and the defendant having been asked by the court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of ROBBERY, FIRST DEGREE.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that DOUG EDWARD JONES is sentenced to a term of fifteen (15) years, under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Oklahoma State Penitentiary at Lexington, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department for the crime of ROBBERY, FIRST DEGREE, said term and sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at Lexington, Oklahoma; which judgment is hereby rendered against the defendant; and, thereupon, the defendant is by the Court notified of his right of appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that defendant should receive drug treatment at the Department of Corrections.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Sheriff of Delaware County, Oklahoma, transport said defendant to the said State Penitentiary at Lexington, Oklahoma, and that the Warden of said penitentiary detain the said defendant according to this judgment, sentence and order, and that the Warden of said penitentiary detain the said defendant according to this judgment, sentence and order, and that the Clerk of this court, do immediately certify, under the seal of this Court, and deliver to the Sheriff of Delaware County, Oklahoma, two copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said penitentiary at Lexington, Oklahoma, and to be left therewith at the said penitentiary,

said copy to be warrant and authority for the imprisonment of the said defendant, and the other copy to be warrant and authority of said Sheriff of Delaware County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.

(SEAL)

JUDY E. LARMON, Court Clerk

BY: /s/ Illegible
Deputy Court Clerk

/s/ W. M. Thomas
JUDGE OF THE
DISTRICT COURT